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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

DANIEL VASQUEZ, Warden, and DANIEL E. LUNGREN, Attorney General of the State of California,
Petitioners,

v.

JOHN G. BROWN,
Respondent.

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Does a United States District Court have jurisdiction to stay the execution of a state death penalty judgment where the prisoner has filed only a request for the appointment of counsel but has never filed a petition for writ of habeas corpus or anything that could reasonably be construed as a petition?

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Petitioners, Daniel Vasquez, Warden, California State Prison at San Quentin, California and Daniel E. Lungren, Attorney General of the State of California, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, issued on December 31, 1991.

## OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit is reported as Brown v. Vasquez ___ F.2d ___ (1991 U.S. App. LEXIS 30183) and appears as Appendix A (pages A-1 through A-25). The amendment to the opinion appears as Appendix B. (Pages B-1 through B-2.)

The published opinion of the District Court is reported as Brown v. Vasquez 743 F.Supp. 729 (C.D. Cal., 1990) and appears as Appendix C (pages C-1 through C-15).

## JURISDICTION

Petitioners invoke the jurisdiction of this Court, under Title 28, United States Code, section 1254 (1) to review a judgment of the United States Court of Appeals for the Ninth Circuit which was filed on December 31, 1991. This petition is filed within the required 90 day period following the entry of judgment. The

decision is a final decision interpreting provisions of the United States Constitution, various sections of the United States Code, and Local Civil Rule 26.8.7 of the Central District of California.

## STATUTORY, CONSTITUTIONAL, AND LOCAL COURT RULES INVOLVED

Title 18 United States Code section 3006A, subdivision (2)(b) states: "Whenever the United States magistrate or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who . . . (B) is seeking relief under section 2241, 2254, or 2255 of title 28."

Title 21 United States Code section 848, subdivision (q)(4)(b) states: "In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially

unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9)."

Title 28, United States Code section 2251 states: "A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

Local Civil Rule 26.8.7 of the United States District Court for the Central District of California states:

"(a) Stay Pending Final Disposition: Upon the filing of a habeas corpus petition,

unless the petition is patently frivolous, the district court shall issue a stay of execution pending final disposition of the matter.

(b) Temporary Stay for Appointment of Counsel: Where counsel in state court proceedings withdraws at the conclusion of the state court proceedings or is otherwise not available or qualified to proceed, the selection panel will designate any attorney from the panel who will assist an indigent petitioner in filing pro se applications for appointment of counsel and for temporary stay of execution. Upon the filing of this application the district court shall issue a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay shall remain in effect for forty-five (45) days unless extended by the court."

## STATEMENT OF THE CASE

Respondent was convicted of the murder of a peace officer and sentenced to death by a California Superior Court. The conviction was affirmed on direct appeal by the California Supreme Court. People v. Brown 46 Cal.3d 432, 250 Cal.Rptr. 604, 758 P.2d 1135 (1988). Respondent's petition for writ of certiorari was denied by this Court. Brown v. California, 489 U.S. 1059, 109 S.Ct. 1329, 103 L.Ed.2d 597 (1989). Respondent then filed a petition for writ of habeas corpus with the California Supreme Court. In re Brown, Case Number S009797. On March 14, 1990, the California Supreme Court denied the petition for writ of habeas corpus. On April 13, 1990, the California Superior Court, in and for the County of Orange, set respondent's execution date for June 8, 1990.

On June 1, 1990, respondent filed a pro se request for the appointment of counsel and a request for a stay. Although respondent stated he intended to file a petition for writ of habeas corpus at some undesignated time in the future, the request for stay contained no allegations of federal constitutional violations in the state court proceedings. Nor did the request for counsel contain any allegation that any federal issue had been exhausted in the state courts. Nevertheless, the District Court issued a forty-five day stay of execution pursuant to Central District Local Civil Rule 26.8.7.

Petitioners promptly noticed a motion to vacate the stay of execution. On July 7, 1990, the stay was extended by the court so as to find counsel willing to represent respondent. See Brown v. Vasquez, supra, 743 F.Supp at 730. On

August 13, 1990, the District Court heard petitioners' motion to lift the stay of execution. On September 4, 1990, the court filed its opinion denying the request to vacate the stay. Id.

Petitioners filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit.[1/] In a published opinion filed on December 31, 1991, that court affirmed the decision of the District Court and held that the issuance of the stay was proper even though no habeas corpus petition had ever been filed. (App. A.) The opinion was amended on February 19, 1992. The mandate issued on this same date. (App. B.)

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1. After oral argument in the Ninth Circuit, but before the judgment, respondent finally filed a petition for habeas corpus. However, the petition was defective in that it contained numerous unexhausted claims for relief. The impact of this filing is discussed infra in footnote 3.

## HOW THE FEDERAL QUESTION IS PRESENTED

In the United States District Court, petitioners moved to vacate the stay of execution order contending that the District Court lacked jurisdiction to issue a stay in the total absence of a petition for writ of habeas corpus or anything that could reasonably be construed as a petition for writ of habeas corpus.

When the District Court held it had jurisdiction to stay the state execution date in the absence of a habeas corpus petition, petitioners filed a timely notice of appeal with the United States Court of Appeals for the Ninth Circuit. That court affirmed the decision of the District Court.

## STATEMENT OF FACTS

The initial filing by the respondent on June 1, 1990, requested the appointment of counsel and a requested a stay of

execution. The request stated, "I intend to file a petition for writ of habeas corpus in this Court, alleging federal constitutional errors which entitle me to relief from the judgment of death. I need the assistance of counsel in preparing and litigating the petition." Brown v. Vasquez, supra, ___ F.2d ___ (1991 U.S. App. LEXIS 30183) (9th Cir. 1991.) (Appendix A-3.) Although respondent stated he intended to file a petition for writ of habeas corpus at some undesignated time in the future, the request for stay contained no allegations of federal constitutional violations during the state court proceedings. Additionally, the request made no allegations that any federal claims had been exhausted in the state courts. Nevertheless, the District Court issued a stay and then later denied petitioners' motion to vacate the stay.

In a published decision issued on December 31, 1991, (and amended on February 19, 1992) the United States Court of Appeals for the Ninth Circuit upheld the jurisdiction of a district court to stay execution of a state death sentence even though the prisoner has filed only a request for counsel but has never filed a federal habeas corpus petition or anything that could reasonably be construed as a petition.

## ARGUMENT

### I

### THE UNITED STATES DISTRICT COURT LACKED JURISDICTION TO STAY THE EXECUTION OF A STATE DEATH SENTENCE WHEN THE PRISONER FILED ONLY A REQUEST FOR THE APPOINTMENT OF COUNSEL BUT NOT A HABEAS CORPUS PETITION

In this state death penalty case, the Court of Appeals for the Ninth Circuit ruled that a federal district court has the inherent power to stay the execution of a state death sentence even though the prisoner has not filed a petition for habeas corpus but has only filed a request for counsel. The decision of the Ninth Circuit is in error. A United States District Court has no inherent power to stay execution of a state death sentence. The District Court "has no power to stay the execution of judgment of a state court save as an incident to the exercise of its jurisdiction in habeas corpus." (Reese v. Teets, 248 F.2d 147, 149 (9th Cir. 1957) The power to stay a state court death

order is solely statutory, as is the power of the court to appoint counsel. There is no inherent authority for a United States District Court to stay a state court proceeding apart from its specific habeas jurisdiction. This Court should grant certiorari to instruct the lower federal courts on the limits of their jurisdiction to grant a stay of execution where no habeas corpus petition has ever been filed.

This is not a concern limited to the Central District of California. With the approval of the Ninth Circuit, <u>every</u> federal district in California has adopted rules for conducting death penalty habeas corpus proceedings which permit the issuance of a stay order by a district court before any petition for habeas corpus has been filed. See Eastern District General Rule 191(h)(2), Northern District Civil Rule 296-8(b), Southern

District Civil Rule 295-2 (h)(2). In at least thirty seven (37) capital cases in which petitioners are named parties, stays have been issued by United States District Courts when no petition for writ of habeas corpus has been filed.[2/] Indeed, some of these case were delayed for as long as two years without a petition being filed! (See entries number 17 and 27 on Chart One, Appendix D, pages D-2 and D-4.) There are another 300 prisoners on California's death row, the majority of whom, predictably, will be filing similar requests for stays. Thus, the problem presented in this case is merely the first of an onslaught of cases from California's death row which will soon engulf the federal district courts in California. Unless this Court acts, petitioners face

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2. A listing of the cases where a stay of execution has been issued by a federal district court in the absence of a habeas corpus petition is set forth in Appendix D at D-1 through D-5.

the very real prospect of having to deal with hundreds of stay orders issued by federal district courts in the total absence of any colorable showings of a constitutional violation and in the total absence of any claims of exhaustion. This Court should act before this practice works to improperly delay scores of death judgments.[3/] See In re Blodgett ___ U.S. ____ 60 U.S.L.W. 3476 (1992 Per curiam opinion).

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3. While a defective petition for writ of habeas corpus was finally filed in this case, over a year after the first stay order was imposed, the issue presented is not moot. Given petitioners' immediate and continual attempts to have this stay vacated, given the number of other cases in which similar stays have been granted, and given the hundreds of potential cases in which similar stays will presumably soon issue, it is clear that the issue presented by petitioners is one "capable of repetition yet evading review." Moore v. Ogilvie 394 U.S. 814, 816 (1969); See also Anderson v. Celebrezze 460 U.S. 780, 784, n.3 (1983). See also Appendix C-8.

Rule 26.8.7 of the Local Civil Rules of the Central District of California purports to authorize the District Court to issue a temporary stay of execution when a state prisoner sentenced to death applies for the appointment of counsel to assist him in preparing a federal habeas corpus petition. Once counsel is appointed, an additional temporary stay may be granted to allow counsel an opportunity to review the record and prepare a full petition. Under the local rule, the stays may be granted without the need for any petition, or its functional equivalent, to be filed. Such stays may be granted in the total absence of a claim that any issues at all have been exhausted in the state courts. Petitioners submit that a district court has no jurisdiction to enter a stay under those circumstances. The filing of a valid petition containing exhausted claims is a necessary

prerequisite to the federal court having jurisdiction to intrude into the state court proceedings. There is no dispute that after a habeas corpus petition has been filed a district court has the power to issue a stay of a state execution. But the court has no such power unless and until such a petition has been filed.

The decision of this Court in Demosthenes v. Baal, 495 U.S. 731, 110 S.Ct. 2223, 109 L.Ed.2d 762, (1990), decided after the local rule was adopted, makes it absolutely clear that a federal court has no jurisdiction to issue a stay unless a valid habeas corpus petition has first been filed by the inmate. Moreover, the local rule is incompatible with the explicit order of this Court in Blodgett that a federal court must not issue a stay in a state capital case unless it takes "all steps necessary" to resolve the matter expeditiously. (In re Blodgett,

___ U.S. ____ 60 U.S.L.W. 3476 (1992 Per curiam opinion) Indeed, this assumed power to issue a stay in the absence of a petition is an invitation to delay.

In Demosthenes v. Baal, supra, a Nevada inmate, Thomas Baal, was a week away from his execution date. He chose not to pursue any further federal collateral review. Nevertheless, his parents filed a petition for federal habeas corpus relief as "next friend" of Thomas Baal. The petition alleged that Baal was not competent to waive federal review of his claims. The District Court held hearings on the claim and then denied relief holding that the court had no jurisdiction to entertain the petition. A certificate of probable cause was denied. The parents appealed to the Ninth Circuit. A divided panel of the Ninth Circuit granted the parents a certificate of probable cause and issued a stay.

This Court vacated the stay and held that because the parents had not made a sufficient showing of mental incapacity, the District Court was without jurisdiction to issue a stay. In the absence of a valid petition for habeas corpus, the District Court had no jurisdiction to act. This Court specifically noted that:

> ". . . federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings only in specified circumstances. Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power. In this case, that basis was plainly lacking. The State is entitled to proceed without federal intervention."

Demosthenes v. Baal, supra, 495 U.S.___, 109 L.Ed.2d at 769 (emphasis added)

Because no petition for writ of habeas corpus had been filed by respondent in this case, the District Court had no jurisdiction to issue a stay. A mere statement a state prisoner wishes to file a federal habeas corpus petition at some undesignated time in the future is insufficient. Without some type of actual petition alleging suitable grounds for relief, a district court lacks jurisdiction to issue any stay. The actions of the District Court and the Ninth Circuit were completely contrary to the holding in Baal and require this Court's intervention. A writ of certiorari should issue.

Title 28 United States Code section 2251 authorizes the issuance of stay by the judge "before whom a habeas corpus

proceeding is pending." As mentioned above, in Reese v. Teets, 248 F.2d 147 (9th Cir. 1957), the Ninth Circuit specifically held that a district court "has no power to stay the execution of judgment of a state court save as an incident to the exercise of its jurisdiction in habeas corpus." (Id., at 149.)[4/] Although the petition in Reese was found to be defective, and thus outside the court's jurisdiction because it raised unexhausted claims, other courts have granted stays in order to preserve their jurisdiction while state proceedings are completed. In each case, however, an actual petition for habeas corpus had been filed in the District Court and its allegations formed the basis for a stay request. See e.g., Modesto v. Nelson, 296

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4. While it is true that the procedural framework surrounding *Reese* has been greatly changed, the statements of the limitation of the district court's power still have validity.

F.Supp. 1375 (ND Calif. 1969); Moorer v. State of South Carolina, 240 F.Supp. 529 (ED SC 1964); United States ex rel. La Marca v. Denno, 159 F.Supp. 486 (SD NY 1958); see also Smith v. Armontrout, 825 F.2d 182 (8th Cir. 1987) [stay of execution in conjunction with habeas corpus petition by relative challenging the inmate's competency to waive further appeals].

In Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980), the Fourth Circuit noted in ruling on an application for stay of an execution date that a federal court's authority is limited to preserving its own jurisdiction, although a stay may effectively permit proceedings to continue in other courts as well. Id., at 491, n. 1. Petitioners have found no published decision other than the one at bar, in which a district court acted without a petition before it. However, in at least

thirty seven (37) cases in which petitioners are named parties, the United States District Courts in California have issued stays when no petition had been filed. (See Appendix D.) Given the published decision in this case, it is likely that federal courts in other jurisdictions will follow suit.

The few relevant authorities support the conclusion that a petition is an absolute jurisdictional prerequisite to the issuance of a stay. See generally Liebman, Federal Habeas Corpus Practice and Procedure §§ 4.3, 6.3, 9.3, 13.3, (1988). The most useful decision is Hooks v. Wainwright, 540 F.Supp. 652 (M.D. Fla. 1982), a class action by Florida death row prisoners which challenged access to the courts and the right to counsel. A member of the class, Timothy Palmes, sought a stay of his execution date from the court before whom the class action suit was

pending. Palmes argued that a previous order in the case, which compelled the state to formulate a plan for providing death row inmates with counsel,[5] entitled him to a stay so that Florida could appoint an attorney for the purpose of preparing state and federal collateral attacks on his judgment. Hooks v. Wainwright, supra, 540 F.Supp. at 653-654. Citing Reese v. Teets, supra, the court concluded that a federal court could issue a stay "only in connection with a habeas corpus proceeding." Id., at 654. "[T]he principle enunciated in Reese . . . is, that federal judicial authority to stay execution of a sentence . . . is limited to cases in which the court's habeas

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5. The district court's holding on this issue was subsequently reversed by the Court of Appeals, which held that the state had no obligation to provide counsel for collateral attacks on the conviction. (Hooks v. Wainwright, 775 F.2d 1433 (11th Cir. 1985), cert. denied, 479 U.S. 913 (1986).)

corpus jurisdiction has been properly invoked." Id., at 655; emphasis added. The court concluded that habeas corpus is "the only legal remedy that potentially offers the primary relief which [Palmes] is seeking, i.e. stay of his execution." Id. Petitioners have found no authority for the proposition that habeas corpus jurisdiction is invoked solely by expressing an expression of intent to seek such relief. Hooks supports the conclusion that a stay may not be issued unless the petition has been filed. See also In re Lindsey, 875 F.2d 1518, 1519 (11th Cir. 1989).

Additionally, in the absence of a petition for habeas corpus there is no way for a district court to ascertain if any of the potential, but as yet unraised, claims have been exhausted in the state courts. This Court has made it abundantly clear that a United States District Court

may not consider a federal habeas corpus petition unless all of the claims presented have been exhausted in the state courts. Failure to exhaust state remedies as to every claim made in a petition for writ of habeas corpus requires dismissal of the entire petition without reaching the merits of any of the claims. Rose v. Lundy 455 U.S. 509, 522.(1982 per curiam opinion) If there is no petition, there can be no showing of exhaustion. Without a showing of exhaustion the court is required to dismiss the petition. Thus, the position assumed by the Ninth Circuit, applicable to all three hundred (300) prisoners on California's death row, and potentially applicable to all the other inmates in the states in the Circuit that have capital punishment, would allow the issuance of a stay without either the filing of a petition or the allegation of exhaustion by the inmate. This Court

should act to prevent such a substantial, unauthorized expansion of the limited, statutory powers of the federal district courts.

It must be stressed that the result petitioners seek does not place an onerous burden on a death row inmate. All an inmate would need to do is fill out the standard preprinted federal habeas corpus form and set forth the federal issues presented to the state supreme court in the direct appeal or any companion habeas corpus petition and add a statement that the matters have been exhausted. This could be accomplished by merely copying the table of contents of each document onto the standard federal habeas corpus petition form and adding the relevant factual information. Surely asking a death row inmate to do what every other state prisoner who seeks federal relief must do-fill out a pre-printed habeas

corpus petition form-cannot be considered overly difficult or arduous. Cf. U.S. v. One 1978 BMW 624 F. Supp. 491, 492 (D. Mass 1985) ["So long as one is able to obtain paper, pencil and a stamp the effort . . . is minimal."] Once such a proper petition has been presented, the court has jurisdiction to issue a stay and can appoint counsel[6/] who can more fully present the legal arguments to the court.

Furthermore, there is no validity to the Ninth Circuit's assertion that because the District Court had the power to appoint counsel it had the power to stay the state proceedings. Without a petition, the District Court had neither the power to appoint counsel nor the power to stay the state execution order. As this Court has specifically held, there is

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6. Just as important, the court may be able to determine that the proposed issues are without merit and deny the petition outright.

no constitutional right to counsel in federal habeas corpus proceedings. McClesky v. Zant 499 U.S.___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). The right to appointment of counsel is strictly statutory. Title 18 U.S.C. section 3006A(a)(2)(B); Title 21 U.S.C. section 848(q)(4)(B); Title 28 U.S.C. section 2251.

Under each of these statutes, appointment of counsel can be undertaken by the court only if the proceeding has reached the point where it can be said there is an action pending. In Title 18 U.S.C. section 3006A (a)(2)(B) the statute requires that there be a financially eligible person "seeking relief." In the case at bar, the prisoner was not yet seeking relief in any way. He specifically stated that the request for relief might come at some time in the future. It cannot be said that the

request for counsel could be construed as an inmate "seeking relief." Similarly, Title 21 U.S.C. section 848 (q)(4)(B) requires that there be proceedings under section 2254. But a section 2254 action requires the filing of a petition. And as the Ninth Circuit specifically found in the case at bar, the death row inmate's request for counsel could in no way be construed as a petition for writ of habeas corpus. (Appendix A-8 - A-9.)

In summary, because none of the prerequisites for appointment of counsel had been meet, the District Court lacked jurisdiction to appoint counsel. Since the power to appoint counsel was the sine qua non of the Ninth Circuit's decision, the District Court lacked either direct authority or jurisdiction tied to the right to appoint counsel upon which to base a stay order. Thus, it is evident that without the filing of a habeas corpus

petition, or a document that can be liberally characterized as such, a United States District Court lacks not only the power to appoint counsel but also lacks the jurisdiction to stay a state ordered death sentence.

Additionally, petitioners submit that this Court's recent decision in In re Blodgett ___ U.S.___, 60 U.S.L.W. 3476 (1992 Per curiam opinion) directed to the Ninth Circuit, has supplanted both the decision of the Ninth Circuit in the case at bar as well as Central District Local Rule 26.8.7. In Blodgett, this Court addressed the Ninth Circuit's two and a half year delay of a Washington capital case in which that court had granted a stay of the execution date. This Court's per curiam opinion found that the state had been prevented from "exercising its sovereign power to enforce the criminal law." This Court held that this was an

interest which had to be accorded "great weight." This Court found that the Ninth Circuit, having granted the stay, had a duty to consider the claims raised by the petitioner without delay because of the potential of prejudice to the State of Washington. If a stay can issue in the absence of any alleged basis for federal jurisdiction, then there is no possible way for the court to consider the claims on the merits "without delay." Thus the holding of the Ninth Circuit in the case at bar is in direct conflict with the strong state interests identified by this Court in Blodgett. A stay in the absence of a petition has been filed violates the clear policy dictates of this Court in Blodgett.

Therefore, a United States District Court has no inherent power to either appoint counsel or stay the state court judgment. Only once a proper habeas

corpus petition is filed does a District Court acquire jurisdiction sufficient to appoint counsel and/or stay the state court's sentence. In the case at bar, because the Ninth Circuit found that no document had been filed that could be considered a petition for habeas corpus, the District Court lacked the authority to stay the state court judgment. The District Court acted in excess of its jurisdiction and to the substantial detriment of the state when it stayed the execution date. The Ninth Circuit's decision proclaiming an inherent power to stay as a concomitant to the power to grant counsel is unsupported in either case law or any decision of this Court. This Court should grant certiorari to clarify that a United States District Court has no power to intervene in a state's enforcement of it own laws and

judgments unless and until a federal habeas corpus petition is actually filed.

## CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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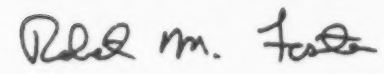

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I have caused service of the within

PETITION FOR WRIT OF CERTIORARI AND APPENDICIES

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, March 3, 1992.

Rosemary Carmona

ROSEMARY CARMONA

Subscribed and sworn to before me
this 3rd day of March, 1992.

Anne Marie Buford

Notary Public in and for said County and State

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91-1485

(2)

Supreme Court, U.S.
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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

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October Term, 1991

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DANIEL VASQUEZ, Warden, and DANIEL E. LUNGREN, Attorney General of the State of California,

Petitioners,

v.

JOHN G. BROWN,

Respondent.

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# APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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# APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| JOHN G. BROWN, | ) | No. 90-56127 |
| Petitioner-Appellee, | ) | |
| v. | ) | D.C. No. CV-90-2815-AWT |
| DANIEL VASQUEZ, Warden, DANIEL E. LUNGREN, Attorney General of the State of California, | ) | OPINION |
| Respondents-Appellants, | ) | |

Appeal from the United States District Court for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted August 29, 1991
Pasadena, California

Filed December 31, 1991

Before: FLETCHER, THOMPSON and LEAVY, Circuit Judges.

Opinion by Judge Thompson

THOMPSON, Circuit Judge:

## FACTUAL BACKGROUND

John G. Brown is a California state prisoner who has been sentenced to death. His conviction and sentence were affirmed by the California Supreme Court. People v. Brown, 46 Cal.3d 432, 250 Cal. Rptr. 604, 758 P.2d 1135 (1988). His petition for a writ of certiorari was denied by the United States Supreme Court. Brown v. California, 489 U.S. 1059 (1989). His petition for a writ of habeas corpus filed with the California Supreme Court was denied. His execution was scheduled for June 8, 1990.

On June 1, 1990, Brown, proceeding pro se, filed in the United States District Court for the Central District of California a "Request for Appointment of Counsel in Death Sentence Case and For Stay of Execution of Death Sentence." In an accompanying declaration he stated that he was under imminent sentence of death,

that the attorney who represented him in state court was unavailable to represent him in his federal habeas proceeding, and that he could not afford to retain an attorney. He further stated: "I intend to file a petition for writ of habeas corpus in this Court, alleging federal constitutional errors which entitle me to relief from the judgment of death. I need the assistance of counsel in preparing and litigating the petition."

Pursuant to its Local Rule 26.8.7 (b),[1] the district court ordered Brown's

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1. Local Rule 26.8.7(b) provides, in relevant part:

> Where counsel in state court proceedings . . . is . . . not available or qualified to proceed, the selection panel will designate an attorney from the panel who will assist an indigent petitioner in filing pro se applications for appointment of counsel and for temporary stay of execution. Upon filing of this application the district court shall issue a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay will remain in effect for forty-five (45)

execution stayed for forty-five days. The district court subsequently extended the stay for an additional thirty days, citing as a primary reason difficulty in finding appointed counsel to represent Brown. On July 30, 1990, counsel was appointed to represent Brown. On August 10, 1990, at appointed counsel's request and pursuant to the Central District's Local Rule 26.8.7(c),[2/] the district court granted an

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days unless extended by the court.

2. Local Rule 26.8.7(c) states that:

> Where counsel new to the case is appointed, upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the district court shall issue a temporary stay of execution unless no nonfrivolous issues are presented. The temporary stay will remain in effect for one hundred twenty (120) days to allow newly appointed counsel to prepare and file the petition.

Following his appointment, Brown's attorney satisfied the requirements of this section by identifying six nonfrivolous and independent constitutional issues which he intended to raise in the habeas

additional stay of 120 days to afford appointed counsel time to prepare and file Brown's habeas petition.

The state respondents moved to vacate the stay of execution. They contended the district court lacked jurisdiction because Brown had not filed a petition for habeas corpus relief, and thus, they argued, there was no proceeding pending before the district court on which to predicate a stay order under 28 U.S.C. 2251.[3/]

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corpus petition. Brown v. Vasquez, 743 F. Supp. 729, 732 n. 10 (C.D. Cal. 1990).

3. This section provides:

A justice or judge of the United Stated before whom a habeas corpus proceeding is pending may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any state for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any state court or by or under the authority of any state shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings

The district court denied the motion. It held that it had jurisdiction under the All Writs Act[4/] to issue any orders necessary to preserve its potential jurisdiction, including a stay of execution in anticipation of the filing of a petition for a writ of habeas corpus. Brown v. Vasquez, 743 F. Supp. 729, 732 (C.D. Cal. 1990). The state respondents appeal. We affirm, although for reasons

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or appeal were pending.

28 U.S.C. 2251.

4. The All Writs Act appears at 28 U.S.C. 1651 (a). It provides that, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Appellants argue that the All Writs Act is superseded for purposes of this case by 28 U.S.C. 2283 (the Anti-Injunction Act), and therefore cannot serve as the jurisdictional basis for the district court's action. We do not address the merits of this claim because we conclude that 28 U.S.C. 2251 provides an adequate independent basis for the district court's exercise of jurisdiction.

different from those stated by the district court.

DISCUSSION

The issue presented by this appeal is whether a district court has jurisdiction to stay the execution of a state prisoner in order to appoint counsel to assist the prisoner in preparing and filing a petition for federal habeas corpus relief. We conclude a district court has such jurisdiction. We have appellate jurisdiction under 28 U.S.C. 1292 (a)(1)[5].

When a death penalty prisoner has a habeas corpus proceeding pending before a federal district court, that court has jurisdiction to stay the prisoner's execution. 28 U.S.C. 2251. Appellants

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5. This section provides, in relevant part, that, "[t]he courts of appeals shall have jurisdiction of appeals from . . .[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ."

contend that a "habeas corpus proceeding" cannot be considered "pending" before a district court under section 2251 until something has been filed with the court that can be interpreted as a petition for a writ of habeas corpus.[6/] Appellants point out that what Brown filed was not a habeas petition, but simply a request and declaration seeking appointment of counsel to help him prepare a habeas petition. We agree that what Brown filed should not be interpreted as a petition for a writ of

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6. The procedural and substantive requirements for a petition for a writ of habeas corpus are found at 28 U.S.C. 2242. This section is augmented by Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts.

habeas corpus.[7] But this does not end the inquiry.

The Supreme Court has recognized that "[t]he writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." Harris v. Nelson, 394 U.S. 286, 290-91 (1969). It is, in essence, "the first line of defense against constitutional violations." Bounds v. Smith, 430 U.S. 817, 828 (1977).

Given the fundamental importance of the writ, it is essential that it be

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7. While recognizing that the federal courts have a responsibility to construe liberally pro se prisoners' vaguely-framed pleadings as habeas petitions where the interests of justice demand, see e.g., Tyler v. United States, 929 F.2d 451 (9th Cir. 1991) (construing "Motion under 28 USC 2255" as a petition for habeas under 28 U.S.C. 2241); Tucker v. Carlson, 925 F.2d 330 (9th Cir. 1990) (section 1983 and Bivens action construed as habeas), what Brown filed here was a request for counsel to help him prepare and file a petition, not, in itself, a petition for writ of habeas corpus.

"administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." Harris, 394 U.S. at 291. The Court has "consistently rejected interpretations of the habeas corpus statute[8/] that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacle of arcane and scholastic procedural requirements." Hensley v. Municipal Court, 411 U.S. 345, 350 (1973).

In Hensley, the Court was called upon to determine whether a state prisoner who had been released on his own recognizance was "in custody" for purposes of the federal habeas corpus statute.9/ In

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8. The federal habeas corpus statute is set forth at 28 U.S.C. 2241 to 2255.

9. In Hensley, the Court was interpreting section 2241(c)(3) which limits the availability of habeas corpus relief to a prisoner who "is in custody in violation of the Constitution or laws

holding that habeas relief is not restricted to situations where the petitioner is subject to present physical confinement, the Court emphasized that "habeas corpus is not `a static, narrow, formalistic remedy,' but one which must retain the `ability to cut through barriers of form and procedural mazes.'" Id. at 349-50 (quoting Jones v. Cunningham, 371 U.S. 236, 243 (1963), and Harris, 394 U.S. at 291).

The Harris admonition to interpret the federal habeas corpus statute with "initiative and flexibility" is especially relevant in the present case in light of the Court's recent decision in McClesky v. Zant, 111 S. Ct. 1454 (1991). In McClesky, the Court held that the doctrine of abuse of the writ[10/] barred a prisoner

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or treaties of the United States."

10. The doctrine of abuse of the writ "refers to a complex and evolving body of equitable principles" which

from asserting a constitutional claim in a subsequent federal habeas corpus proceeding when he had not raised the claim in his initial federal application and could not show either good cause for failing initially to raise the claim and prejudice resulting from such failure, or that fundamental miscarriage of justice would result if the claim were not entertained. McClesky, 111 S. Ct. at 1470. The Court also restated its position taken in Antone v. Dugger, 465 U.S. 200, 205-06 & n. 4 (1984) (per curiam), that a habeas petitioner will not be excused from failing to raise a claim in his first federal petition on the ground that his counsel had to prepare the first petition in haste and did not have

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determine whether a habeas corpus petitioner can bring a federal constitutional claim in a habeas action when he failed to assert the claim in a prior habeas proceeding. McClesky, 111 S. Ct. at 1467.

time to become familiar with the case. McClesky, 111 S. Ct. at 1467.

Given the teaching of McClesky, a prisoner applying for habeas corpus relief in federal court must assert all possible violations of his constitutional rights in his initial application or run the risk of losing what might be a viable claim. This is a substantial burden. Compounding this burden, the petitioner is often illiterate or poorly educated and yet must decipher a complex maze of jurisprudence in order to determine which of his constitutional rights, if any, may have been violated. Such a task is "difficult even for a trained lawyer to master," and, understandably, is often beyond the abilities of most prisoners. Murray v. Giarratano, 492 U.S. 1, 28 (1989) (Stevens, J., dissenting). It is thus not surprising that when a prisoner attempts to prepare his own habeas petition without

the assistance of counsel, the product of his efforts is often a confusing and incomprehensible amalgam of claims which not only fails to protect the prisoner, but which ties up valuable court time in the inevitable struggle to comprehend what it is that is being alleged.[11]

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11. In a report of the Committee on Habeas Corpus, a group of circuit judges addressed the problems faced by the judiciary in dealing with pro se for petitions for habeas relief:

> Much of the judges' time is spent trying to decipher and interpret the chaotic papers that come to them from prison inmates. Many of the petitioners are illiterates, or person of limited education who depend upon "jail-house lawyers" for assistance in preparing these documents. Not only are such practitioners notorously unreliable, but their work product is often a mass of confused and incomprehensible mumbo-jumbo.

Application for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States Courts, 33 F.R.D. 364, 384 (1963). See also, Marshall W. Krause, A Lawyer Looks at Writ-Writing, 56 Calif. L. Rev. 371, 376 (1968) ("the

The Supreme Court has recognized the inherent problems faced by prisoners, and by the courts, when prisoners are forced to file habeas petitions pro se. In Johnson v. Avery, the Court held that a state could not bar prisoners from furnishing assistance to other prisoners in filing habeas corpus petitions. It recognized, however, that even with the help of experienced prison "writ-writers," petitions filed without the assistance of an attorney are "often so unskillful as to a burden on the courts with receive them." 393 U.S. 483, 488 (1969). In his concurrence, Justice Douglas argued that the pre-petition assistance of an attorney would greatly benefit both the prisoner and the court system:

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number of frivolous petitions filed would be greatly reduced if prisoners could have an objective evaluation of their chance before filing their petitions").

> A lawyer, after examining the prisoner's transcripts or conducting an independent investigation of the facts, could immediately advise him on a course of action. Lacking the money to hire a lawyer, the prisoner must spend considerable time researching the law, preparing the required legal documents, and filing them. Sometimes years pass before the prisoner discovers what a lawyer could have told him in several weeks - that his case either has or lacks merit. The prisoners who have militantly prosecuted frivolous actions have wasted time they could have devoted to preparing themselves for release from prison. The state, by shouldering these indigent prisoners with the responsibility of acting as their own counsel, has dissipated the taxpayers' money in wasted manpower and court costs.

Id. at 494 , n. 10 (Douglas, J., concurring) (quoting Charles Larsen, A Prisoner Looks at Writ-Writing, 56 Calif. L. Rev. 343, 345-346 (1968)).

Notwithstanding the foregoing, as the Court in McClesky reasserted, there is no constitutional right to counsel in federal habeas corpus proceedings, McClesky, 111

S. Ct. at 1471, citing Pennsylvania v. Finley, 481 U.S. 551, 555 (1987), even if the habeas petitioner may be facing a sentence of death. Murray, 492 U.S. at 10. In his concurrence in Murray, however, Justice Kennedy recognized that "[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." Id. at 14 (Kennedy, J., concurring).

Justice Stevens dissented in Murray. In arguing that a constitutional right to counsel should exist in the initial stages of a habeas corpus proceeding, he emphasized the many obstacles faced by an incarcerated habeas petitioner, as well as the tremendous drain that pro se habeas petitions place upon the judicial system:

> The State already appoints counsel to death row inmates who

> succeed in filing postconviction petitions asserting at least one nonfrivolous claim; therefore, the additional cost of providing . . . death row inmates competent counsel to prepare such petitions should be minimal. [citation omitted]. Furthermore, multiple filings delay the conclusion of capital litigation and exacerbate the already serious burdens these cases impose on the State's judicial system and the legal department. It seems obvious that professional preparation of the first postconviction petition, by reducing successive petitions would result in a net benefit [to the court system].

Murray, 492 U.S. at 29-30 (Steven, J., dissenting).[12/]

The Central District of California's Local Rules 26.8.7(b) and (c) address the foregoing concerns. These rules authorize the appointment of counsel to assist a

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12. Justices Brennan, Marshall and Blackmun joined the dissent. When combined with Justices Kennedy and O'Connor, who joined in the concurrence, a total of six members of the Court took express notice of the plight confronting inmates attempting to challenge their conviction by habeas corpus without the assistance of counsel.

death penalty prisoner in preparing and filing a habeas petition, and provide for issuance of a stay of execution pending this process.

The appellants do not challenge the validity of these rules. Rather, they argue that a prisoner who seeks the appointment of counsel and a stay of execution under the rules must allege some federal constitutional violation to provide the district court with a necessary habeas "proceeding" to give it a jurisdictional base to support a stay of execution. The appellants assert it is a minor burden at most to require a prisoner to allege some constitutional violation. They argue all the prisoner need do is file something that can be interpreted as a habeas corpus petition, no matter how inartfully it may be drawn. Thereupon, according to the thrust of the appellant's argument, a long-suffering district court

through the process of reviewing the petition and allowing amendments will assist the prisoner in eventually coming up with a reasonably adequate habeas petition.

We reject this argument. The Central District rules do not require the filing of a habeas petition as a prerequisite to the issuance of a stay order. Neither does the federal habeas corpus statute. See 28 U.S.C. 2251. Although there is no constitutional right to the appointment of counsel in a death penalty habeas proceeding, this does not preclude a district court from appointing counsel in such a case. Cf. Murray, 492 U.S. at 10, n. 5 (State of Virginia not constitutionally required to appoint counsel for a death penalty habeas petitioner, but its courts have statutory authority to do so). If a district court can appoint counsel to represent a death

penalty habeas petitioner, surely it can issue a stay of execution when necessary to make the appointment and to allow appointed counsel reasonable time to do his job. Otherwise, the prisoner could be executed before appointed counsel could be found or before that counsel could undertake the task for which he was appointed. The habeas process need not tolerate the possibility of such a perverse absurdity.

We conclude that the underlying purpose of the writ of habeas corpus requires us to view the application for the appointment of counsel to assist in the preparation of a death penalty prisoner's habeas corpus petition as an integral part of the habeas corpus process under section 2251. Viewed in this manner, a habeas corpus proceeding is pending before a federal district court when such an application is filed.

The appellants cite to Rule 3 of the Federal Rules of Civil Procedure which provides that "[a] civil action is commenced by filing a complaint in the court." They argue by analogy that a habeas corpus proceeding under section 2251 cannot "commence" until something which can be interpreted as a petition for habeas corpus relief is filed. We disagree.

While it is true that a habeas corpus proceeding is civil in nature, see, e.g., Kurtz v. Moffitt, 115 U.S. 487, 494 (1885), it is equally true that such a proceeding is dramatically different from any other type of civil action. As the Supreme Court has stated, habeas corpus proceedings are of "'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights." Bounds, 430 U.S. at 827 (quoting Johnson, 394 U.S. at 485).

As a result, courts are not bound to systematically apply traditional rules governing civil proceedings when to do so would be inconsistent with the overriding purpose of the federal habeas corpus statute.[13/]

Appellant's assertion that the Anti-Injunctions Act prevents the district court from ordering a stay of Brown's execution is also without merit. The

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13. Rule 11 of the Rules Governing Section 2254 Causes in United States District Courts, enacted by Congress in 1977, recognizes that the Civil Rules do not necessarily control habeas corpus proceedings. Rather, the Civil Rules, "to the extent that they are not inconsistent with [the Habeas Corpus Rules], may be applied, when appropriate, to [habeas corpus] petitions . . . ."

The Advisory Committee notes following Rule 11 further clarify that, "The court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus. Rule 11 merely recognizes and affirms their discretionary power to use their judgment in promoting the ends of justice." See also Harris, 394 U.S. at 299.

Anti-Injunction Act provides that, "[a] court of the United States may not grant an injunction to stay any proceeding in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The federal habeas corpus statute, however, clearly constitutes an "expressly authorized" exception to the Act. Mitchum v. Foster, 407 U.S. 225, 234-35 (1972). As a result, the Anti-Injunction Act does not prevent a district court from staying a state court proceeding pursuant to 28 U.S.C. 2251.

CONCLUSION

We hold that the application for the appointment of counsel to assist a death penalty prisoner in preparing a petition for federal habeas corpus relief, and for a stay of execution, filed pursuant to the Central District of California Local Rules 26.8.7(b) and (c), constitutes part of a

"habeas corpus proceeding" as set forth in 28 U.S.C. 2251. As such, the district court had jurisdiction to stay Brown's execution pending the appointment of counsel and the filing of a habeas petition.

AFFIRMED.

# APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| JOHN G. BROWN, | No. 90-56127 |
| Petitioner-Appellee, | |
| v. | D.C. No. CV-90-2815-AWT |
| DANIEL VASQUEZ, Warden, DANIEL E. LUNGREN, Attorney General of the State of California, | ORDER AND AMENDED OPINION |
| Respondents-Appellants, | |

Appeal from the United States District Court for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted August 29, 1991
Pasadena, California

Filed December 31, 1991
Amended February 19, 1992

Before: Betty B. Fletcher, David R. Thompson and Edward Leavy, Circuit Judges.

Opinion by Judge Thompson

ORDER

The opinion filed December 31, 1991 is amended as follows:

At page 17436 of the slip opinion, seventh line from the top, immediately after the sentence that ends "in such case." and before the cite "*Cf. Murray* . . ." the following is inserted: *See* 18 U.S.C. § 3006A (a)(2)(B) (United States district court may provide counsel to persons seeking habeas relief where "the interests of justice so require");

The signal preceding the cite to *Murray* is changed from *Cf.* to *cf.*

The mandate shall now issue.

# APPENDIX C

John G. BROWN, Petitioner,

v.

Daniel VASQUEZ, Warden of San Quentin State Prison, Respondent.

No. CV 90-2815 AWT

United States District Court, C.D. California.

Sept. 4, 1990.

MEMORANDUM ORDER ON MOTION TO VACATE STAY OF EXECUTION

TASHIMA, District Judge.

BACKGROUND AND PROCEDURAL SUMMARY

This is a death penalty "habeas corpus" case. Petitioner was convicted of murder of a peace officer in California state court and was sentenced to death. The conviction and sentence have been affirmed on appeal. *People* v. *Brown*, 46 Cal.3d 432, 250 Cal.Rptr. 604, 758 P.2d 1135 (1988), *cert denied*, 489 U.S. 1059, 109 S.Ct 1329, 103 L.Ed.2d 597 (1989). On March 14, 1990, the California Supreme

Court denied petitioner's petition for writ of habeas corpus. The Orange County Superior Court then set petitioner's execution date for June 8, 1990.

On June 1, 1990, acting *pro se*, petitioner filed a "Request for Appointment of Counsel in Death Sentence Case and For Stay of Execution of Death Sentence." This "Request" was accompanied by petitioner's declaration in which he verifies that he is under imminent sentence of death, that the attorney who represented him in state court is unavailable to represent him in his federal habeas proceedings and that he cannot afford to retain an attorney. The declaration further states: "I intend to file a petition for writ of habeas corpus in this Court, alleging federal constitutional errors which entitle me to relief from the judgment of death. I need

the assistance of counsel in preparing and litigating the petition."

On June 1, the court issued an order staying execution of the sentence for a 45-day period, pursuant to Local Rule 26.-8.7(b) (the 45-day stay).[1/] At the time the 45-day stay was issued, no other pleading had been filed by petitioner. Shortly thereafter, on June 21, respondent, who is the warden of San Quentin Prison, noticed a motion to vacate the stay of execution. On July 7, the 45-day stay was extended for an additional 30

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1. Local Rule 26.8.7(b) provides:
Where counsel in state court proceedings . . . is . . . not available or qualified to proceed, the selection panel will designate an attorney from the panel who will assist an indigent petitioner in filing pro se applications for appointment of counsel and for temporary stay of execution. Upon the filing of this application the district court shall issue a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay will remain in effect for forty-five (45) days unless extended by the court.

days, primarily because the court had not yet secured qualified counsel for appointment. The hearing date of respondent's motion also was continued. Finally, on July 30, the court was able to appoint counsel to represent petitioner. On August 8, petitioner, through appointed counsel, filed his opposition to respondent's motion to vacate the stay of execution and also applied for the 120-day stay under Local Rule 26.8.7(c) (the 120-day stay).[2/] The 120-day stay was granted on August 10 and remains in effect. Respondent's motion to vacate the

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2. Local Rule 26.8.7(c) provides, in relevant part:

> Where counsel new to the case is appointed, upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the district court shall issue a temporary stay of execution unless no nonfrivolous issues are presented. The temporary stay will remain in effect for one hundred twenty (120) days to allow newly appointed counsel to prepare and file the petition.

stay of execution was heard and orally denied on August 13. Because there is little case law on the issue tendered by this motion, the court here sets forth an explanation of the reasons for its ruling denying respondent's motion.[3/]

As the above summary of the proceedings to date indicates, petitioner has not yet filed a petition for writ of habeas corpus--certainly not any pleading denominated as such. Based on this procedural posture, respondent contends

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3. The Local Rules under which both the 45-day stay and the 120-day stay were issued are part of Local Rule 26.8, which is entitled "Special Requirements for Habeas Corpus Petitions Involving the Death Penalty." This rule is, essentially, a "uniform" rule, having been adopted by all of the district courts in California with only minor variations. *See* E.D.Cal. Local Rule 191; N.D.Cal Local Rule 295; S.D.Cal. Local Rule 295-2. The purpose of this rule, as even a cursory review will disclose, is to permit the orderly hearing and determination of capital habeas cases and to avoid, to the extent possible, last-minute stays of execution and midnight telephone calls.

that this court has no jurisdiction to issue a stay of execution. According to respondent, a federal district court acquires jurisdiction to issue a stay of execution only after a habeas petition is filed. *See* 28 U.S.C. § 2251. Thus, the issue is whether or not a district court has jurisdiction to issue a stay of execution before a habeas petition is filed, on the basis of a request for appointment of counsel and the *pro se* representation that petitioner intends to file a habeas petition alleging non-frivolous federal constitutional error.[4/] Petitioner has advanced a number of grounds justifying issuance of a stay

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4. The alleged federal constitutional errors which petitioner intends to present are non-frivolous in the sense that petitioner states that such errors "entitle me to relief from the judgment of death."

prior to the filing of a habeas petition; however, only one requires discussion.[5/]

DISCUSSION[6/]

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5. However, because respondent cites it as controlling Circuit authority, a word must be said about *Reese* v. *Teets*, 248 F.2d 147 (9th Cir. 1957). Respondent relies on it for the proposition that a district court "has no power to stay the execution of judgment of a state court save as an incident to the exercise of its jurisdiction in habeas corpus." *Id.* at 149. The court agrees with petitioner that the reason why *Reese* was decided the way it was no longer obtains; therefore, it does not control in the present circumstances. *Reese's* no jurisdiction holding was based on then-controlling case law that a state prisoner was required to petition for certiorari from the denial of his state habeas petition before seeking federal habeas relief. *Id.* at 148. *See Darr* v. *Burford*, 339 U.S. 200, 216-17. 70 S.Ct 587, 596-97, 94 L.Ed 761, (1949). That holding of *Darr* was subsequently overruled, some years after *Reese*. *See Fay* v. *Noia*, 372 U.S. 391, 435, 83 S.Ct. 822, 847, 9 L.Ed.2d 837 (1963). Thus, the exhaustion requirement on which *Reese* rested is no longer good law and *Reese* was an exhaustion case. It does not discuss at all the All Writs Act.

6. The discussion that follows applies equally to both the 45-day stay and the 120-day stay. An argument could be made that the motion is now moot with

The All Writs Act provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a). In the leading case of *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1965), the Supreme Court held that the All Writs Act authorized a court of appeals to issue an injunction against a merger in order to preserve the possibility of reviewing the

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respect to the former stay because it has been superseded by the latter. However, the 45-day period is so short that, as in this case, a motion to vacate that stay could not be heard and determined before the stay expired or was superseded. Thus, under the well-established doctrine of "capable of repetition yet evading review," *see, e.g. Murphy* v. *Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982) (per curiam), the court holds that respondent's motion is not moot as to the 45-day stay granted under Local Rule 26.8.7(b).

decision of the Federal Trade Commission (FTC) that the merger would violate the antitrust laws even before a petition for review was filed. The Court cited numerous cases for the proposition that the power "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may later be perfected." *Id.* at 603, 86 S.Ct. at 1742.[7/] Respondent seeks to distinguish *Dean Foods* on the ground that once an action reviewable by the appellate court starts, "the exclusive jurisdiction of the court of appeals to review the final outcome also starts." On the other hand, respondent contends, a district court's jurisdiction does not commence until an action is filed in that court. Thus,

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7. *See also in Re Grand Jury Proceedings United States*, 626 F.2d 1051, 1059 (1st Cir.1980)(writ issued to preserve evidence on appeal, although notice of appeal not yet filed, in aid of potential jurisdiction).

potential jurisdiction can only be preserved by an appellate court. The agreement is mistaken.

Under the Federal Trade Commission Act, 15 U.S.C. § 45(c), a petition for review of an order of the FTC, filed with a court of appeals, is the initial entry of such an action into the Article III court system. Likewise, a habeas petition to review a state court conviction, filed with a district court, is also the initial entry of such an action into the Article III court system. Thus, the analogy between *Dean Foods* and a habeas proceeding is quite compelling. The procedural posture in both *Dean Foods* and the case at bench are identical: The court issuing the stay was the initial federal court with the potential jurisdiction to hear the matter on the merits and no petition initiating the action had yet been filed. *Dean Foods* expressly hold that the

authority of an appellate court "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." 384 U.S. at 603-04, 86 S.Ct. at 1742, *quoting Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185 (1943). In short *Dean Foods* authorizes issuance of a writ under the All Writs Act if it is necessary to preserve a court's potential jurisdiction.[8/]

Respondent's argument that specific non-frivolous constitutional error must be alleged in the initial pleading in order to make clear that such potential

---

8. It is somewhat ironic that respondent should take the opposing position in this case. California itself has succeeded in the Supreme Court in obtaining a stay *before* a petition for writ of certiorari was filed. See *California* v. *Velasquez*, 445 U.S. 1301, 100 S.Ct. 1333, 63 L.Ed.2d 595 (1980) (Rhenquist, J., in chambers).

jurisdiction will exist is an argument going to the merits.[9/] Moreover, the cases impose no such requirement. For example, in *I.T.T. Community Dev. Corp.* v. *Barton*, 569 F.2d 1351, 1359 n. 19 (5th Cir. 1978), the court held: "When potential jurisdiction exists, a federal court may issue status quo orders to ensure that once its jurisdiction is shown to exist, the court will be in a position to exercise it." At this stage, petitioner has sufficiently shown that potential habeas jurisdiction exists: He has stated under oath, *pro se*, that his conviction and sentence of death are final; that he

---

9. Respondent concedes that, "The All Writs Act may be used to preserve direct appellate jurisdiction," but contend that it may not be used by a district court "to create habeas corpus jurisdiction in the absence of a specific constitutional issue." This distinction is contrary to the plain wording of the statute. The All Writs applies to "*all courts* established by Act of Congress" (emphasis added), not just to appellate courts.

has exhausted available state remedies; and that "federal constitutional errors which entitle [him] to relief from the judgment of death" can be alleged.[10/] To expect more from a *pro se* petitioner who is entitled to, but who has not been furnished with, appointed counsel may itself amount to the denial of a constitutional right.

Finally, respondent relies on *Demosthenes* v. *Baal*, ____ U.S. _____, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990) (per curiam), as recent, controlling authority which requires a habeas petition to be filed as a prerequisite to the issuance of a stay. They misconstrue the case. In fact, in *Demosthenes*, a petition had been

---

10. The issue is not present with respect to the 120-day stay. As required by Local Rule 26.8.7(c), in his application for that stay, counsel made a preliminary specification of non-frivolous constitutional issues which could be raised. Counsel has specified six separate issues which are summarized in three pages.

filed by the prisoner's parents acting as his "next friends." The narrow holding of this case, in vacating the stay, is that the requirement for next friend standing, as recently set forth in *Whitmore* v. *Arkansas*, _____ U.S. _____, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990), had not been met. The Court did state, as quoted by respondent,

> federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings only in specified circumstances. Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power.[11/]

*Demosthenes*, 110 S.Ct. at 2226. This is petitioner's first federal petition after exhaustion of state remedies. He represented, *pro se*, that he was able to

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11. *Demosthenes*, like *Reese*, *see* footnote 5, *supra*, did not, since it had no occasion to do so, address a district court's power to issue a stay under the All Writs Act.

allege federal constitutional error. His newly-appointed counsel has subsequently filed a three-page specification of non-frivolous constitutional issues which he believes could be raised in the petition.[12/] Thus, this is a proper case for a habeas proceeding. Petitioner has adequately demonstrated that at least the potential for habeas jurisdiction exists. The All Writs Act, as construed in *Dean Foods*, furnishes "an adequate basis" for the granting of both the 45-day stay and the 120-day stay in order to preserve this court's potential habeas jurisdiction.

IT IS ORDERED that respondent's motion to vacate the stay of execution of the sentence of death is DENIED.

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12. It may be noted that the California Supreme Court did find error and, in one instance, it was uncertain whether the error was federal constitutional error; however, it further found that the error was harmless. *People* v. *Brown*, 46 Cal.3d at 446-48, 250 Cal.Rptr. 604, 758 P.2d 1135.

# APPENDIX D

# CHART ONE

## CASES IN WHICH UNITED STATES DISTRICT COURTS IN CALIFORNIA HAVE STAYED STATE ORDERED EXECUTIONS IN THE ABSENCE OF A PETITION FOR WRIT OF HABEAS CORPUS

NYF=Habeas Petition Not Yet Filed

| Petitioner's Last Name | District Court Case Number | District | Date of stay | Date Habeas Petiton Filed |
|---|---|---|---|---|
| 1.Anderson | CV-92-0488-JGD | CD | 1-24-92 | NYF |
| 2.Bean | CIV-S-90-0648-EJG-GGH | ED | 6-8-90 | 7-18-91 |
| 3.Bell | C-91-1115-FMS | ND | 4-12-91 | NYF |
| 4.Boyde | CV-91-2522-WDK | CD | 5-13-91 | NYF |
| 5.Brown | CV-90-2815-AWT | CD | 6-1-90 | 11-06-91 |
| 6.Burton | CV-91-1652-AWT | CD | 3-27-91 | NYF |
| 7.Caro | C-89-1400-GPV | ND | 4-24-89 | 4-27-90 |
| 8.Carrera | CV-F-90-478-EDP-P | ED | 8-6-90 | 8-26-91 |
| 9.Coleman. C. | C-90-1588-VRW | ND | 6-1-90 | 7-15-91 |
| 10.Coleman, R. | C-89-1906-RFP | ND | 6-2-89 | 1-19-90 |

| Petitioner's Name | District Court Case Number | District | Date of stay | Date Habeas Petiton Filed |
|---|---|---|---|---|
| 11.Douglas | CV-91-3055-RSLW | CD | 6-7-91 | NYF |
| 12.Fields | CV-92-0465-RG | CD | 1-23-91 | NYF |
| 13.Frank | CV-91-6287-AHS | CD | 11-22-91 | NYF |
| 14.Ghent | C-90-2763-WAI | ND | 10-1-90 | NYF |
| 15.Hamilton | CV-F-90-363-OWW-P | ED | 6-18-90 | 12-03-91 |
| 16.Howard | CV-88-7240-WJR | CD | 1-24-89 | 9-25-89 |
| 17.Hunter | C-90-3275-JW | ND | 11-26-90 | NYF |
| 18.Jackson | CV-91-6983-JG-DEE | CD | 8-8-91 | NYF |
| 19.Jennings,M. | C-89-1360-WAI | ND | 11-7-89 | 4-17-91 |
| 20.Jennings,W. | CV-F-91-684-OWW-P | ED | 12-16-91 | NYF |

| Petitioner's Name | District Court Case Number | District | Date of stay | Date Habeas Petiton Filed |
|---|---|---|---|---|
| 21.Johnson | C-90-3219-DLJ | ND | 11-9-90 | NYF |
| 22.Kimble | CV-90-4826-SVW | CD | 9-12-90 | 9-17-91 |
| 23.Lang | CV-91-4061-JMI | CD | 7-30-91 | NYF |
| 24.Mattson | CV-91-5453-WJR | CD | 10-9-91 | NYF |
| 25.McLain | CV-89-3061-JGD | CD | 5-18-89 | 12-28-90 |
| 26.Miller | CV-91-2652-KN | CD | 5-16-91 | NYF |
| 27.Miranda | CV-89-7130-RJK | CD | 12-15-89 | NYF |
| 28.Morales | CV-91-0682-DT | CD | 2-8-91 | NYF |
| 29.Odle | C-88-4280-CAL | ND | 10-24-88 | 5-31-89 |
| 30.Ramirez | CV-91-3802-CBM | CD | 7-12-91 | NYF |

| Petitioner's Name | District Court Case Number | District | Date of stay | Date Habeas Petiton Filed |
|---|---|---|---|---|
| 31.Rich | CV-S-89-0823-EJG-GGH | ND | 6-8-89 | NYF |
| 32.Robbins | CV-91-4768-TJH | CD | 9-4-91 | NYF |
| 33.Siripongs | CV-89-6530-WDK | CD | 11-9-89 | 7-6-90 |
| 34.Stankewitz | CV-F-91-616-OWW-P | ED | 11-15-91 | NYF |
| 35.Thompson,R. | CV-90-6605-JMI | CD | 12-15-90 | NYF |
| 36.Thompson,T. | CV-89-3630-RAG | CD | 6-15-89 | 1-16-90 |
| 37. Turner | CV-F-91-153-REC-P | ED | 3-29-91 | NYF |

MOTION FILED
APR 1 1992

91-1425

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

DANIEL VASQUEZ,
Warden, San Quentin State Prison,
*Petitioner,*

*vs.*

JOHN G. BROWN,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does a federal district court have jurisdiction to stay the execution of a state death penalty judgment prior to the filing of a habeas corpus petition?

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

---

DANIEL VASQUEZ,
Warden, San Quentin State Prison,

*Petitioner,*

*vs.*

JOHN G. BROWN,

*Respondent.*

---

## MOTION OF AMICUS CURIAE FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

---

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in the above captioned case. Counsel for petitioner has consented, but counsel for respondent has refused consent.

In the accompanying brief, *amicus* argues that the Anti-Injunction Act prohibits stays of execution of state criminal judgments except as authorized by 28 U. S. C. § 2251. That section only authorizes a stay when habeas corpus proceedings are "pending." Proceedings are pending only after the petition is filed.

## INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it

affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The federal district courts in California have needlessly delayed enforcement of the state's death penalty, reducing its deterrent effect. The pre-filing stay of execution is one tool that the district courts have used for inexcusable delays. See App. Pet. Cert., Appendix D. Those delays are contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

April, 1992

Respectfully submitted,

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*Criminal Justice Legal Foundation*

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## BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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## SUMMARY OF FACTS AND CASE

In June 1980, nearly 12 years ago, John G. Brown fired on police officers who were trying to arrest him on a bench warrant. He killed Officer Reed, gravely wounded Officer Overly, seriously wounded Officer Henninger, shot a private citizen named Terezia between the eyes, causing permanent and grave injury, and shot another citizen, named McKinney, in the leg. *People* v. *Brown*, 46 Cal. 3d 432, 440, 758 P. 2d 1135 (1988). Brown was convicted and sentenced to death, and the California Supreme Court affirmed on August 25, 1988. *Id.*, at 463. This Court denied certiorari six months later. *Brown* v. *California*, 489 U. S. 1059 (1989).

On March 14, 1990, the California Supreme Court denied state habeas. On June 1, 1990, *eighty days later*, Brown filed in federal district court a request for counsel

and for stay of execution. The request stated that Brown intended to allege federal constitutional errors, but it did not state any factual basis whatever for any claim. Pursuant to its local rule, the District Court issued a 45-day stay. It subsequently extended the stay and rejected the Attorney General's assertion that it had no jurisdiction to issue stays before the habeas petition is filed. *Brown* v. *Vasquez*, 743 F. Supp. 729 (C.D. Cal. 1990). The Ninth Circuit affirmed, 952 F. 2d 1164 (1991), but stayed its mandate *sua sponte* on January 22, 1992. The Attorney General has filed a petition for writ of certiorari.

## SUMMARY OF ARGUMENT

The Anti-Injunction Act is a strict prohibition of federal interference with state court proceedings, subject only to a few narrowly construed exceptions. No exception other than 28 U. S. C. § 2251 applies to habeas corpus.

A case is not "pending" within the meaning of section 2251 until a petition is filed. A document which does not meet the minimal showing required by statute and rule cannot be "deemed" to be a petition.

Although not essential to a jurisdictional analysis, it is worth noting that practical alternatives to pre-filing stays exist. Potential petitioners can apply for counsel immediately upon exhaustion of state remedies. Prompt application will provide counsel sufficient time to place all exhausted claims in petition form and obtain a stay.

## ARGUMENT

The two courts below held that jurisdiction existed to stay the execution, but they took very different paths to that conclusion. The District Court found that it had authority to issue a stay independently of the habeas stay provision, 28 U. S. C. § 2251, basing its decision on the All-Writs Act, 28 U. S. C. § 1651(a). *Brown* v. *Vasquez*, 743 F. Supp. 729, 731 (C.D. Cal. 1990). The District

Court does not even mention the Anti-Injunction Act, 28 U. S. C. § 2283.

Apparently recognizing the flaw in the District Court's position, the Court of Appeals instead construed section 2251 to authorize a stay before a petition is filed. The Court of Appeals notes, correctly, that section 2251 is an exception to the Anti-Injunction Act. 952 F. 2d, at 1169. Neither the state nor *amicus* has ever said it was not. The sole question on this approach is whether section 2251 applies prior to the filing of a petition.

Part I of this brief addresses the District Court's theory that power to stay exists independently of section 2251. Part II examines Brown's contention that papers filed prior to the actual petition can be "deemed" to be a petition for the purpose of issuing a stay. Part III examines the Court of Appeals' theory that section 2251 authorizes pre-filing stays.

## I. Section 2251 is the sole authority for staying a state execution.

### *A. The Anti-Injunction Act.*

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U. S. C. § 2283. Execution of judgment is a state court proceeding within the meaning of this section. *Hill* v. *Martin*, 296 U. S. 393, 403 (1935).[1]

This Congressional command is fundamentally different from judicially created doctrines of abstention, such as *Younger* v. *Harris*, 401 U. S. 37 (1971). "This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in

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1. *Hill* is a civil case, but the principles underlying the Anti-Injunction Act apply with greater, not lesser, force in criminal cases. See *Juidice* v. *Vail*, 430 U. S. 327, 335 (1977).

a *clear-cut prohibition* qualified only by specifically defined exceptions." *Amalgamated Clothing Workers of America* v. *Richman Bros.*, 348 U. S. 511, 515-516 (1955) (emphasis added).

This Court has strictly enforced the Act and narrowly construed the exceptions. "On its face, the present Act is an *absolute prohibition* against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions." *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Eng'rs*, 398 U. S. 281, 286 (1970) (emphasis added).

In *Atlantic Coast Line*, the respondents "intimated that the Act only establishes a 'principle of comity,' not a binding rule on the power of the federal courts." *Ibid.* The Court emphatically rejected that contention and held

> "that any injunction against state court proceedings otherwise proper under general equitable principles *must* be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, *the exceptions should not be enlarged by loose statutory construction*." *Id.*, at 287 (emphasis added).

The essence of the District Court's opinion is that a federal court can stay state proceedings "if it is necessary to preserve [the federal] court's *potential* jurisdiction." 743 F. Supp., at 317 (emphasis added). There is no such exception to the Anti-Injunction Act.

The page limit on this brief does not permit an extended discussion of the history of the Anti-Injunction Act. One is contained in our brief in the Court of Appeals. Briefly, however, there are only three exceptions in the Act. They are (1) exceptions expressly created by Congress, (2) injunctions "in aid of [the federal court's] jurisdiction," and (3) injunctions "to protect or effectuate its judgments."

The express exception is, of course, 28 U. S. C. § 2251, which is discussed in part III, *post*. The third exception is clearly inapplicable, because there is no judgment to protect or effectuate.[2]

This leaves the "aid of jurisdiction" exception. Where an action is *in rem* and the federal court has *first* acquired jurisdiction of the *res*, this exception authorizes the court to present state court interference. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229 (1922). It authorizes a federal court which has already issued an injunction in a case within its jurisdiction to enjoin the issuance of later, contrary injunctions by state courts. *Looney* v. *Eastern Texas R. Co.*, 247 U. S. 214, 221 (1918). It also authorizes "federal courts to stay proceedings in State cases removed to the district courts." Revision Note to 28 U. S. C. § 2283, at 445 (1988 ed.)

The exception definitely does not authorize a federal court to stay a state action merely to insure that the controversy will be determined in federal court rather than state court. This rule was recognized in *Kline*, *supra*, 260 U. S., at 232. It was reiterated by a unanimous Court, including the *Toucey* dissenters, in *Southern R. Co.* v. *Painter*, 314 U. S. 155 (1941). The 1948 revision expressly restored the law "as generally understood and interpreted prior to the Toucey decision." Revision Note, *supra*.

*Vendo Co.* v. *Lektro-Vend Corp.*, 433 U. S. 623 (1977) refutes the notion that a federal court has carte blanche authority to preserve the status quo against state court action. The parties in that case had filed breach of contract and antitrust suits in state and federal court, respectively. *Id.*, at 627. Vendo eventually received a judgment in state court of over seven million dollars, *id.*,

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2. This exception was added in 1948 to overrule *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118 (1941) and adopt the view of the dissent in that case. See *Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U. S. 518, 524 (1986). It authorizes a federal court to prevent relitigation in state court of issues already determined in federal court. See *Toucey*, at 152-153 (Reed, J., dissenting).

at 628, enough to take control of both corporate defendants, *id.*, at 641.

The Federal District Court enjoined execution of the state judgment, relying on two independent bases of jurisdiction. First, the court believed that the injunction section of the Clayton Act was an express exception to the Anti-Injunction Act. Second, the court "found that collection efforts would eliminate two of the three plaintiffs and thus that the injunction was necessary to protect the jurisdiction of the court, within the meaning of that exception to § 2283." *Id.*, at 629.

Five Justices explicitly rejected the antitrust ground of jurisdiction on the facts before the Court. The majority was divided on the question of whether the Clayton Act could be an exception under other circumstances, however. *Id.*, at 640-641 (plurality opinion of Rehnquist, J.); *id.*, at 643 (Blackmun, J., concurring in the result).

On the second ground, the plurality relied on *Kline*, *supra*, and emphatically rejected the notion that preservation of the "case or controversy" constitutes an exception to the Anti-Injunction Act. "No case of this Court has ever held that an injunction to 'preserve' a case or controversy fits within the 'necessary in aid of its jurisdiction' exception; neither have the parties directed us to any other federal court decisions so holding." *Id.*, at 642.[3]

The concurring Justices expressed no disagreement with the plurality's analysis on the "aid of jurisdiction" point, which was necessary to the judgment in which they concurred. *Vendo* can therefore be considered a majority holding on this point. Cf. *Horton* v. *California*, 110 L. Ed. 2d 112, 123, 110 S. Ct. 2301, 2308 (1990) (statement in plurality opinion not binding because unnecessary).

In summary, the Anti-Injunction Act is an absolute prohibition, not a discretionary admonition. The rule is broadly construed, and the exceptions are narrowly

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3. The plurality also held that the factual basis for the District Court's holding was flawed. *Ibid.*

construed. The "aid of jurisdiction" exception is limited to its historical functions of enforcing the removal statutes, implementing previously entered decrees in pending cases, and retaining possession of the *res* in proceedings *in rem*. The only change in the 1948 revision was to overrule *Toucey* and authorize the federal courts to *prevent* relitigation of issues they had already decided. *Kline*, *Painter*, and *Vendo* establish that there is no general exception to preserve a controversy for federal adjudication.

*B. The All-Writs Act.*

*1. Dean Foods.*

The District Court based its jurisdiction on the All-Writs Act, 28 U. S. C. § 1651(a) and *FTC* v. *Dean Foods Co.*, 384 U. S. 597 (1966). *Dean Foods* is distinguishable on several grounds.

First and foremost, *Dean Foods* did not involve any legislative prohibition on injunctive relief. It was a pure case of searching for authority in the absence of any clear indication from Congress one way or the other. See *id.*, at 608. The difference between that type of case and one involving a prohibition on injunctions is critical.

A related distinction, and one nearly as important, is that *Dean Foods* does not involve the delicate relationship between state and federal courts. Federal injunction of state proceedings is a grave step, never to be taken lightly. See, *e.g.*, *Younger* v. *Harris*, 401 U. S. 37, 41, 43 (1971); *Demosthenes* v. *Baal*, 109 L. Ed. 2d 762, 769, 110 S. Ct. 2223, 2226 (1990).

Finally, *Dean Foods* involved a writ issued by an appellate court in a case which had already entered the federal adjudicatory process. The case was pending before the Federal Trade Commission. 384 U. S., at 599. *Dean Foods* cited as authority cases in which appellate courts had issued orders in cases pending in the lower courts, which would later be appealed. *Id.*, at 603.

The District Court in the present case stated that *Dean Foods* is authority for pre-filing stays because the injunction issued before "the initial entry of [the] action into the

*Article III* court system." 743 F. Supp., at 731 (emphasis added). There is nothing in *Dean Foods* or the authorities on which it relies to justify this distinction between Article I and Article III adjudicatory bodies.

The principal case relied on by *Dean Foods* is *Whitney Nat. Bank* v. *Bank of New Orleans & Trust Co.*, 379 U. S. 411 (1965). See *Dean Foods*, 384 U. S., at 604. *Whitney* is a ringing affirmation of the legitimacy and the wisdom of Congress's choice to substitute an administrative body in the place of the district court in certain specialized areas. *Whitney*, 379 U. S., at 420-421. *Dean Foods*, 384 U. S., at 604, also relies on *Continental Illinois National Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 675 (1935). That case, in turn, relies on the *Kline* v. *Burke Construction*, *supra*, for the proposition that "a federal court, *having first acquired jurisdiction* of the subject matter, could enjoin the parties . . . . " 294 U. S., at 675 (emphasis added). Where it is the *state* courts who have *first* acquired jurisdiction, *Dean Foods* provides no authority for a general power to enjoin them. Indeed, the District Court's interpretation of *Dean Foods* would amount to a judicial repeal of the Anti-Injunction Act.

*2. Supreme Court stays.*

The District Court noted that the Supreme Court and its Justices can and do issue stays of state court proceedings in cases where the certiorari petition has not yet been filed. *Brown* v. *Vasquez*, *supra*, 743 F. Supp., at 731, n. 8 (citing *California* v. *Velasquez*, 445 U. S. 1301 (1980) (Rehnquist, J., in chambers)). Far from supporting Brown's position, this power and its source refute that position.

The Supreme Court is unique among federal courts. This Court alone has appellate jurisdiction over cases arising in the state courts. 28 U. S. C. § 1257. This unique jurisdiction calls for a unique power regarding stays, see *Atlantic Coast Line*, *supra*, 398 U. S., at 296, and Congress has provided one in 28 U. S. C. § 2101(f):

> "In any case in which the final judgment or decree of any court is subject to review by the Supreme

> Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . . . "

The contrast between the wording of this statute and the wording of section 2251 is striking and significant. The Supreme Court may grant stays in cases merely "subject to review," but the district court on habeas corpus is limited to granting stays when a "proceeding is pending" before that court. Both provisions were adopted in the same act: the 1948 revision of Title 28. See Pub. L. No. 80-773, 62 Stat. 961-962, 966.

Congress knows how to unambiguously authorize pre-filing stays when it deems them necessary. The staying of state court action in a case which has not yet entered the federal system is a grave step. Congress has seen fit to allocate such power to the Supreme Court alone.

Supreme Court practice thus provides no authority for a comparable power in the district court. This Court's stay power derives from a special statute. Congress has conferred a unique power on the Supreme Court in order to discharge its unique responsibilities. Congress has also conferred a stay power on the federal habeas court, but that power is worded differently. The difference is intentional.

## II. The application for stay and counsel cannot be "deemed" to be a petition.

Brown argued in the court below that a habeas proceeding was "pending" upon the filing of the request for stay and counsel because that document could be "deemed" a habeas petition under the District Court's local rules. Response Brief 35-37. Although the Court of Appeals did not adopt this reasoning, its decision effectively came to the same result. *Amicus* has found only

one case supporting such an exercise, and the situation there was quite different. In *Studebaker Corp.* v. *Gittlin*, 360 F. 2d 692 (CA2 1966), the court held a hearing before the complaint was filed, but it issued the injunction afterwards. *Id.*, at 694. Under the facts of the case, *Studebaker* is authority for no more than the proposition that a court may deem an extensive affidavit, which contains the information required in a complaint, to be a complaint *for the purpose of holding a hearing* on whether to grant an injunction. Whether an injunction can actually issue without an actual complaint is another question.

A Supreme Court case closer to the present facts points in the opposite direction. In *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147 (1984), would-be plaintiff Brown claimed discriminatory treatment by her former employer, the Welcome Center. After exhausting administrative remedies with the Equal Employment Opportunity Commission (EEOC), she had 90 days to bring a civil action. *Id.*, at 148. Six weeks later, Brown filed a copy of her EEOC "right-to-sue letter" with the District Court and requested counsel. The magistrate mailed her the required form and questionnaire and reminded her of the deadline. Brown returned the questionnaire on the 96th day after the right-to-sue letter. She filed an "amended complaint" on the 130th day, 40 days past the deadline. *Ibid.*

The Supreme Court held that the EEOC letter could not be deemed a complaint. The Court noted that under Federal Rule of Civil Procedure 3 an action is commenced by filing a complaint. The District Court had determined "that the right-to-sue letter did not qualify as a complaint under Rule 8 *because there was no statement in the letter of the factual basis for the claim of discrimination, which is required by the Rule.*" *Id.*, at 149 (emphasis added). Upholding this ruling, this Court rejected the Court of Appeals' notion that civil rights plaintiffs were somehow exempt out of a special solicitude for this class of plaintiffs. *Id.*, at 149-150.

The complaint later filed, the Court went on to explain, could not "relate back" to the date of filing of the

EEOC letter because that letter did not meet the very minimal requirements to constitute a complaint.

> "Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' [Citations.] *Because the initial 'pleading' did not contain such notice, it was not an original pleading* that could be rehabilitated by invoking Rule 15(c)." *Id.*, at 150, n. 3 (emphasis added).

*Baldwin County* holds, therefore, that notwithstanding the liberal rules of modern pleading, there are limits beyond which a paper cannot be considered a pleading. A mere application for counsel, or even counsel's statement of "nonfrivolous" issues, is beyond the limit for a habeas corpus petition.

The habeas corpus application or petition is not governed by Rule 8 of the Federal Rules of Civil Procedure ("Civil Rules") but rather by 28 U. S. C. § 2241 and Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"). The Habeas Rules are an Act of Congress. Although originally promulgated by the Supreme Court, see 425 U. S. 1169, they were amended by Congress and approved as amended. See Pub. L. No. 94-426 § 1, 90 Stat. 1334 (1976).

In the Court of Appeals, Brown attacked the state's argument that a petition must allege facts supporting a claim for relief. Such an argument, Brown said, urges the court to usurp the legislative function. Response Brief 35. This argument is precisely backwards. By approving Habeas Rule 2(c), Congress has explicitly required that the petition "shall specify all the grounds for relief . . . and shall set forth in summary form the facts supporting each of the grounds thus specified." How clear must Congress be? Judicial disregard of this clear legislative requirement would usurp the legislative function.

It is true, of course, that a "petition for *habeas corpus* ought not to be scrutinized with technical nicety." *Holiday* v. *Johnston*, 313 U. S. 342, 350 (1941). But we are dealing with essentials here, not niceties. "Liberal as the courts are and should be as to practice in setting out claimed violations of constitutional rights, the applicant must meet the statutory test of alleging facts that entitle him to relief." *Brown* v. *Allen*, 344 U. S. 443, 461 (1953).

Congress has quite deliberately made the initial pleading requirements more strict for habeas petitions than for civil complaints in some respects. Civil complaints are generally signed by the attorney and usually need not be verified. Civil Rule 11. Habeas petitions must be verified, 28 U. S. C. § 2242, or signed under penalty of perjury, Habeas Rule 2(c). The rule requires the petitioner to personally sign the petition. *Ibid*. The statute permits "next friend" petitioners, but only under very limited circumstances. See *Whitmore* v. *Arkansas*, 109 L. Ed. 2d 135, 150, 110 S. Ct. 1717, 1727 (1990).

More importantly, section 2242 and Habeas Rule 2(c) retain "fact pleading" rather than the "notice pleading" of Civil Rule 8. " '[N]otice pleading' is not sufficient, for the petition is expected to state facts that point to a '*real possibility of constitutional error*.' See *Aubut* v. *State of Maine*, 431 F. 2d 688, 689 (1st Cir. 1970)." Advisory Committee Note to Habeas Rule 4 (emphasis added); see also 1 J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 11.4, at 149 (1988). Even Professor Liebman, who calls this requirement "curious," *ibid*., and "anomalous," *id*., at 149, n. 3, grudgingly acknowledges two justifications for it. "First, . . . , habeas corpus is in fact designed to review and draws heavily on the record of prior state proceedings . . . . Second, fact pleading . . . enables courts . . . to separate substantial petitions from insubstantial ones quickly and without need of adversary proceedings." *Ibid*.

The second reason is particularly pertinent here. If the petition fails to state facts which, if true, would entitle the petitioner to relief, there is nothing to consider. See *Hill* v. *Lockhart*, 474 U. S. 52, 60 (1985); *id*., at 62 (White, J.,

concurring). If the factual basis of the claim has already been decided in a state proceeding entitled to deference, it is error to grant a stay. *Demosthenes* v. *Baal*, 109 L. Ed. 2d 762, 769, 110 S. Ct. 2223, 2226 (1990).

*Barefoot* v. *Estelle*, 463 U. S. 880, 894 (1983) established that "it is entirely appropriate that an appeal which is 'frivolous and entirely without merit' be dismissed after the hearing on a motion for a stay." Absent an unresolved and constitutionally significant factual issue, consideration of the petition by the district court is no different.

In summary, there is an irreducible minimum below which a paper cannot be deemed a petition. It must be verified or signed under penalty of perjury. It must be signed by the petitioner absent extraordinary circumstances. Most importantly, it must serve the basic function of identifying the claims and their factual basis. The papers on file at the time the District Court granted the stay did not meet this essential requirement. The local rulemaking authority does not include the power to contradict the habeas statutes and rules. See *Frazier* v. *Heebe*, 482 U. S. 641, 646 and n. 4 (1987). The local rules, therefore, cannot permit these papers to be "deemed" a petition.

## III. A proceeding is "pending" under § 2251 when the petition is filed and not before.

The crux of this case is when a habeas corpus proceeding is "pending." Authority on the question is sparse, simply because very few litigants have had the effrontery to ask a court for relief before they have filed a complaint. See *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 30 (1989) (assuming courts precluded from granting TRO before complaint filed). What little authority exists, however, is uniformly against the Court of Appeals' conclusion. Even the most partisan of the pro-petitioner commentators states unquestioningly that the petition is a prerequisite to federal jurisdiction as the law now stands. 1 J. Liebman,

*Federal Habeas Corpus Practice and Procedure* § 11.1, at 145 (1988).

*A. Civil Cases Generally.*

*In re Connaway*, 178 U. S. 421 (1900) appears to be the only direct authority for when an action begins so as to make it "pending." Connaway filed a complaint in the Circuit Court for the Ninth Circuit against Overton, but he was unable to serve it before Overton died. He then obtained a writ of *scire facias* to substitute the executor of Overton's estate as a party. *Id.*, at 423. A federal statute authorized the issuance of the writ "from the office of the clerk of the court where the suit is *pending*." *Id.*, at 425 (emphasis added).

The circuit court granted the executor's motion to set aside the *scire facias* on the ground that no suit had been pending at the time of Overton's death, because he had not been served. Connaway applied to the Supreme Court for a writ of mandamus.

> "When can a suit be said to be 'in any court of the United States,' or said to be 'pending' therein? Is not the answer inevitable, from the time the suit is commenced? *It cannot be pending until it is commenced,* and if it continue until the death of the 'plaintiff or petitioner or defendant,' the requirements of the section seem to be satisfied.
>
> "Another inquiry becomes necessary — when is a suit commenced? For an answer we must go to the California statutes.[4] By section 405 of the Code of Civil Procedure, it is provided: 'Civil actions in the courts of this State are commenced by filing a complaint.' . . . *The filing of the complaint, therefore, is the commencement of the action and the jurisdiction of the court over the case.*" *Id.*, at 427-428 (emphasis added).

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4. At this time federal courts adopted the procedural statutes of the states in which they sat, absent an applicable federal statute. See 2 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 1.02[1], at 1-5 (2nd ed. 1991).

*Connaway* thus squarely holds that in a court governed by a commencement rule equivalent to former section 405 of the California Code of Civil Procedure, a suit is not in the court and is not "pending" until the complaint is filed. Rule 3 of the Federal Rules of Civil Procedure is indistinguishable from the statute construed in *Connaway*: "A civil action is commenced by filing a complaint with the court." The rule of *Connaway* is therefore the rule today in federal civil cases. See *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147, 149-150 (1984).

*B. Habeas Corpus Cases.*

The Court of Appeals, presented with the clear authority of *Connaway* and *Baldwin County*, nonetheless found that the purpose of habeas corpus permits the federal courts to make an exception to the usual rules and consider a habeas corpus proceeding "pending" as soon as the prospective petitioner asks for counsel. 952 F. 2d, at 1168. The court's analysis is backwards. The differences between habeas corpus and other cases call for stricter requirements for a stay, not more lax requirements.

"The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983). Ignoring this principle, the Court of Appeals quotes *Bounds* v. *Smith*, 430 U. S. 817, 828 (1977) out of context for the proposition that federal habeas corpus review of state convictions "is, in essence, 'the *first* line of defense against constitutional violations.' " 952 F. 2d, at 1166 (emphasis added). Once again, the Ninth Circuit is acting as if state courts do not exist, despite repeated admonitions by this Court. See, *e.g.*, *Sumner* v. *Mata*, 455 U. S. 591, 597-598 (1982); *Lewis* v. *Jeffers*, 111 L. Ed. 2d 606, 622-623, 110 S. Ct. 3092, 3102 (1990); *Estelle* v. *McGuire*, 116 L. Ed. 2d 385, 396, 112 S. Ct. 475, 480 (1991).

In *Bounds*, the prison inmates sought access to a law library in order to prepare a variety of pleadings, which included state collateral proceedings and state and federal civil rights actions, as well as federal habeas. See 430

U. S., at 828, n. 17. In the course of contrasting these actions with discretionary appeals following a first appeal as of right, the *Bounds* Court referred to the group collectively as the "first line of defense." This contrast was necessary to distinguish *Ross* v. *Moffitt*, 417 U. S. 600 (1974), which involved counsel on discretionary appeals. The crucial difference, said *Bounds*, was that in *Moffitt* the prisoners were "likely to have appellate briefs previously written on their behalf, trial transcripts, and often intermediate appellate court opinions to use in preparing petitions for further review." 430 U. S., at 827.

So it is in the present case. Capital defendants in California are provided counsel not only on appeal but also on the state habeas petition. See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Rule 3, Deering's Cal. Codes, 2 Rules of Court 262-265 (1992 Supp.) ("Cal. Supreme Court Policies"). Unlike the brand new cases envisioned by the *Bounds* Court, California capital defendants have the benefit of extensive briefing *and investigation*, *id.*, ¶ 2-2, at 264, by state-paid attorneys followed by comprehensive review by the state's highest court, Cal. Penal Code § 1239(b), before the case ever enters the federal system. The Court of Appeals' discourse about unprepared, *pro se* petitioners, 952 F. 2d, at 1167-1168, inexplicably ignores the great lengths to which California has gone to provide representation.

It is quite true, as the Court of Appeals says, that the Federal Rules of Civil Procedure do not apply where they are inconsistent with the Habeas Rules. Habeas Rule 11. But Civil Rule 3 is entirely consistent with both the letter and the spirit of the Habeas Rules.

The people of California have litigated this case to final judgment. The case has been thoroughly reviewed and affirmed by the highest court of the largest state of the Union. A presumption of finality and legality has attached. *Barefoot*, *supra*, 463 U. S., at 887. The people have a powerful interest in executing their judgment. *In re Blodgett*, 116 L. Ed. 2d 669, 674, 112 S. Ct. 674, 676 (1992). Indeed, enforcement of the law against murder is

the single most important function of state government. Congress has authorized the federal courts to delay the enforcement of such judgments, but *only* upon a showing of a "real possibility of constitutional error." Advisory Committee Note to Habeas Rule 4, *supra*. As Rule 4 recognizes, there may not be any substantial federal question. Each of the petitioner's claims may be either (1) not truly federal, see *Estelle* v. *McGuire*, *supra*, 116 L. Ed. 2d, at 396, n. 2, 112 S. Ct., at 480; (2) precluded by state court fact-finding, see *Lewis* v. *Jeffers*, *supra*, 111 L. Ed. 2d, at 622-623, 110 S. Ct., at 3102; (3) proposals for "new rules" precluded by *Teague* v. *Lane*, 489 U. S. 288 (1989); or (4) simply insubstantial.

The rule of *Connaway*, *Baldwin County*, and Civil Rule 3 that a proceeding is commenced only upon the filing of a complaint/petition is fully consistent with the procedure for preliminary review set forth in Habeas Rules 2 and 4. These rules contemplate a screening process to summarily dispose of meritless petitions. See also 28 U. S. C. § 2243, para. 8. The clear import of these rules is that the state is entitled to proceed with the execution of its judgment absent a showing of a "real possibility of constitutional error." That cannot be done if stays are issued without any showing at all.

Arguments have been made for an automatic stay on the first habeas petition in capital cases. See, *e.g.*, L. Powell, et al., Ad Hoc Committee on Federal Habeas Corpus in Capital Cases: Committee Report and Proposal 7 (1989) ("Powell Committee Report"). Congress has not yet seen fit to adopt these proposals. The Congressional mandate that the state has a right to proceed with its judgment in the absence of a substantial claim remains in force. Unless the defendant is required to file his petition before obtaining a stay, there is no way to carry out that mandate.

## IV. Practical alternatives exist.

Although fundamental principles of federal jurisdiction uniformly point to a lack of jurisdiction, the Court of Appeals attempts to justify the stay with the dire prospect of a capital defendant being executed before his first federal petition could be filed. 952 F. 2d, at 1168-1169. Jurisdictional questions do not require practical answers, not even in habeas cases. *Ex parte Kearney*, 7 Wheat. (20 U. S.) 38, 45 (1822); see also *Atlantic Coast Line*, *supra*, 398 U. S., at 294. Nonetheless, it is worth noting that with reasonable diligence on the part of the habeas petitioner and his attorney, the problem raised by the court below is readily avoidable.

The California Supreme Court routinely grants stays of execution pending certiorari to this Court. See Cal. Supreme Court Policies, *supra* p. 16, Rule 1, at 262-263.[5] Certiorari is not required for exhaustion, however. *Fay* v. *Noia*, 372 U. S. 391, 435 (1963), overruled on other grounds in *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 669, 111 S. Ct. 2546, 2565 (1991). Work on the habeas petition can begin immediately. Counsel has three months to file the certiorari petition, Supreme Court Rule 13.1, and this Court typically takes several months to rule on it. The initial setting of an execution date then takes at least 60 days, usually 90. Cal. Penal Code § 1193. Thus, an inmate who applies for counsel promptly upon exhaustion of state remedies will have the better part of a year to

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5. Under the system of unified review adopted after Brown's case was decided, the state habeas petition is filed in the Supreme Court after the direct appeal reply brief but before argument. Cal. Supreme Court Policies, *supra* p. 16, Rule 3 ¶ 1-1.1, at 263. The petition is dismissed before decision of the appeal if it is insubstantial or consolidated with the appeal if it is substantial. See, *e.g.*, *People* v. *Gonzalez*, 51 Cal. 3d 1179, 1240, 800 P. 2d 1159 (1990). State remedies are thus exhausted upon decision of the direct appeal.

obtain counsel and file the petition.[6] Cf. Powell Committee Report, *supra*, at 6 (six months sufficient).

The Court of Appeals makes much of the rule of *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) in holding that pre-filing stays are necessary. See 952 F. 2d, at 1166-1167. This reliance is misplaced. It ignores the very substantial resources the state has already provided for investigation of potential claims. See *ante*, at 16. Federal habeas counsel need not investigate the case from scratch, but only review and supplement a completed investigation. See, *e.g.*, *Antone* v. *Dugger*, 465 U. S. 200, 206 (1984) (claim readily available in state pleadings).

*Rose* v. *Lundy*, 455 U. S. 509, 520 (1982) "provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." Before a death row inmate ever gets to federal habeas, California has provided him with the forum, the counsel, and the investigative resources to comply with that direction. The cards should all be on the table by this point.

It is ironic indeed that while the district courts in all the other states with capital punishment discharge their duties without pre-filing stays, the rule in question here has been adopted in the state where it is least necessary. The time available to the diligent petitioner is sufficient, given the extensive state review and the "secondary and limited" role of federal habeas corpus. In addition to being illegal, the rule purporting to authorize a pre-filing stay is unnecessary.

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6. There is no inconsistency in permitting a court to consider motions to appoint counsel or proceed *in forma pauperis* before the "commencement" of a proceeding. See *Baldwin County*, *supra*, 466 U. S., at 148; 42 U. S. C. § 2000e-5(f)(1). Such motions impact only the court and the treasury, not the rights of the adverse party. Compare 28 U. S. C. § 2251 ("proceeding is pending") with 18 U. S. C. § 3006A(a)(2) ("person who . . . is seeking relief").

### V. *Demosthenes* v. *Baal* accurately summarizes the controlling principles.

*Demosthenes* v. *Baal*, 109 L. Ed. 2d 762, 110 S. Ct. 2223 (1990) states that "federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings only in specified circumstances." *Id.*, at 769, 110 S. Ct., at 2226. Although no citation is given, this is a statement of the fundamental principle established by the authorities in part I, *supra*. The Anti-Injunction Act bars federal interference absent an exception, and section 2251 is the only relevant exception.

"Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power. In this case, that basis was plainly lacking. The State is entitled to proceed without federal intervention." *Ibid.*

## CONCLUSION

The judgment of the Court of Appeals should be summarily reversed.

April, 1992

Respectfully submitted,

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Supreme Court, U.S.
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No. 91-1425

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1991

DANIEL VASQUEZ, Warden, and
DANIEL E. LUNGREN,
Attorney General of the State of California,
*Petitioners,*

vs.

JOHN G. BROWN,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Does a United States District Court have jurisdiction to stay the execution of a state prisoner pending appointment of counsel to assist the prisoner in preparing and filing a habeas corpus petition?

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No. 91-1425

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IN THE
SUPREME COURT OF THE UNITED STATES

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October Term, 1991

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DANIEL VASQUEZ, Warden, and DANIEL E. Lungren, Attorney General of the State of California,

Petitioners,

v.

JOHN G. BROWN,

Respondent.

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, John G. Brown ("Brown"), hereby responds to the Petition for Writ of Certiorari (the "Petition") filed by petitioners Daniel Vasquez, Warden, California, State Prison at San Quentin, California, and Daniel E. Lungren, Attorney General of the State of California ("the State"), seeking review of the judgment and opinion of the United States Court of

Appeals for the Ninth Circuit, issued on December 31, 1991 and published as Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991).

## ADDITIONAL STATUTE INVOLVED

28 U.S.C. § 1651(a), The All Writs Act, provides: "The Supreme Court and all courts established by act of congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

## STATEMENT OF THE CASE

Brown was convicted of murder of a peace officer in California state court and was sentenced to death. The conviction and sentence were affirmed on appeal. People v. Brown, 46 Cal.3d 432, 250 Cal. Rptr. 604, 758 P.2d 1135 (1988), cert. denied, 489 U.S. 1059, 109 S. Ct. 1329, 103 L. Ed. 2d 597 (1989). The California Supreme Court denied Brown's petition for a writ of habeas corpus and the Orange County Superior Court then set Brown's execution date for June

8, 1990. Brown v. Vasquez, 743 F. Supp. 729 (C.D. Cal. 1990).

On June 1, 1990, acting pro se, Brown filed a "Request for Appointment of Counsel in Death Sentence Case and for Stay of Execution of Death Sentence." Brown, 743 F. Supp. at 729. Brown's June 1, 1990, request for stay was accompanied by a declaration stating: "I intend to file a petition for writ of habeas corpus in this court, alleging federal constitutional errors which entitle me to relief from the judgment of death. I need the assistance of counsel in preparing and litigating the petition." Brown, 743 F. Supp. at 729-730. Brown also stated he was, "under imminent sentence of death, that the attorney who represented him in state court [was] unavailable to represent him in his federal habeas proceedings and that he [could not] afford to retain an attorney".

On June 1, 1990, the district court issued an order staying execution of the sentence for a 45-day period, pursuant to C.D. Cal. Local Rule 26.8.7(b). Shortly thereafter, the State moved to vacate the stay of execution. On July 7, 1990, the 45-day

stay was extended for an additional 30 days, "primarily because the court had not yet secured qualified counsel for appointment." Brown, 743 F. Supp. at 730. On July 30, 1990, the court appointed counsel to represent Brown, and on August 8, 1990, that counsel filed Brown's opposition to the State's motion to vacate the stay of execution and also applied for a 120-day stay under Local Rule 26.8.7(c). In contrast to the State's statement of the facts, and "[a]s required by Local Rule 26.8.7(c), in his application for [the 120-day] stay, [Brown's] counsel made a preliminary specification of non-frivolous constitutional issues which could be raised. Counsel . . . specified six separate issues which are summarized in three pages." Brown, 743 F.Supp. at 732 n. 10. The 120-day stay was granted on August 10, 1990, and was subsequently extended to permit petitioner's counsel the opportunity to investigate and present petitioner's habeas corpus petition. Id.

On September 4, 1990, the district court filed its opinion denying respondent's motion to vacate the stay. The State appealed to the Ninth Circuit, which heard the matter on August

29, 1991. On November 4, 1991, Respondent filed his habeas corpus petition alleging 29 separate constitutional claims. On December 31, 1991,[1] the Ninth Circuit affirmed the district court judgment. Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991).

## SUMMARY OF ARGUMENT

The issue raised by the State is moot. Brown has already filed his federal habeas petition. Even if, arguendo, the issue is "capable of repetition", it is not "evading review." The State can raise the issue in a case in which no petition has yet been filed.

The Petition should also be denied because the Ninth Circuit correctly decided the issue. The approach taken by the Ninth Circuit is reasoned and practical particularly after the Court's decision in McCleskey v. Zant, 499 U.S. __, 111 S. Ct. 1454 (1991) in which the Court held that a federal habeas petitioner must assert all possible constitutional issues in an initial petition or risk losing potentially viable claims. Local

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[1] A few lines of this decision were amended on February 19, 1992.

Rule 26.8.7 ensures that the petitioner has a meaningful opportunity to comply with the mandate of McCleskey. The State's principal purported authorities for its position are not on point. Demosthenes v. Baal, 110 S. Ct. 2223 (1990) is a standing case, not a jurisdiction case. In re Blodgett, 112 S. Ct. 674 (1992), has nothing to do with the instant case. 28 U.S.C. § 2251 provided an adequate basis for the district court's jurisdiction, and even if it did not, the All Writs Act (28 U.S.C. §1651(a)) provides an adequate independent jurisdictional basis. Finally, it is anomalous for the State Attorney General to be seeking Supreme Court review of a district court local rule when that Attorney General was part of the task force that promulgated that rule.

## ARGUMENT

### 1. This Case Is Moot.

The State's Petition is moot. Brown has already filed his federal habeas petition. Even if the issue arguably is "capable of repetition", it is not "evading review." The State can raise

the issue in any one of the cases it cites in which no petition has yet been filed.

2. The Ninth Circuit's Decision Is Correct.

The Petition should also be denied because the Ninth Circuit fully considered and correctly decided the issue.

The State contends that Demosthenes v. Baal, 495 U.S. 731, 110 S. Ct. 2223 (1990), holds that the filing of a formal habeas corpus petition is a prerequisite for district court jurisdiction to issue a stay of execution. Demosthenes holds no such thing. Demosthenes is a standing case, not a jurisdiction case. The only holding in Demosthenes is that those who sought to assert the rights of the petitioner in that case did not have standing to do so.

Here, the Ninth Circuit and the district court correctly found two different adequate bases for the issuance of the stay, namely, 28 U.S.C. § 2251 and 28 U.S.C. § 1651(a) (the All Writs Act).

Title 28 U.S.C. § 2251 authorizes a district court judge, "before whom a habeas corpus proceeding is pending" to issue a

stay of execution. The Ninth Circuit correctly rejected the State's contention that "habeas corpus proceeding" must be interpreted so narrowly that a habeas corpus proceeding cannot be said to be "pending" even after a death penalty prisoner has filed an application for the appointment of counsel to assist in the preparation of his habeas corpus petition as authorized by C.D. Local Civil Rule 26.8.7. The Ninth Circuit's rejection of that narrow construction has firm support. The Court has repeatedly admonished that the writ of habeas corpus is not a narrow, formalistic remedy, rather it is a remedy that must be administered with initiative and flexibility. Jones v. Cunningham, 371 U.S. 236, 243 (1963); Harris v. Nelson, 394 U.S. 286, 290-291 (1969).

The All Writs Act, 28 U.S.C. §1651(a), provides an adequate independent basis for the district court's exercise of jurisdiction. The All Writs Act authorizes all federal courts, including district courts, to issue injunctive orders to preserve their potential jurisdiction. FTC v. Dean Foods Co., 384 U.S. 597, 603-605 (1965); Application of United States of America

for an Order Authorizing an In-Progress Trace of Wire Communications Over Telephone Facilities, 616 F.2d 1122, 1129 (9th Cir. 1980). In this case, the district court properly held that the All Writs Act authorized it to issue the stay of execution in order preserve its potential habeas jurisdiction. Brown v. Vasquez, 743 F. Supp. at 731-732.

Here, the Ninth Circuit reasoned, "[t]he admonition to interpret the federal habeas corpus statute with 'initiative and flexibility' is especially relevant in the present case in light of the Court's recent decision in McCleskey v. Zant," 499 U.S. __, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991). Brown v. Vasquez, 952 F.2d 1164, 1166 (9th Cir. 1991). McCleskey requires the prisoner to assert all possible violations of his constitutional rights in his initial application or risk losing potentially viable claims. McCleskey, 111 S. Ct. at 1472. If a district court is forced to require a prisoner file that now all-important first petition before the district court can stay that prisoner's execution to permit the appointment of counsel to

assist in the preparation of that very petition, the door to habeas relief will be effectively sealed.

The Ninth Circuit took a very practical and reasoned approach to the reality of post-McCleskey habeas corpus practice. That approach is not in need of further review.

In re Blodgett, __ U.S. __, 112 S. Ct. 674 (1992), has nothing to do with this case. In Blodgett, the Court denied a petition for a writ of mandamus directing the court of appeal to issue its decision on a two-year old appeal from the denial of a second federal habeas petition. Id. at 675. Blodgett stands for the proposition that a court of appeal has a duty to consider claims raised in appeals from denials of successive habeas petitions without delay. Id. at 676. In marked contrast, this case does not involve successive petitions, the district court has not yet ruled on the first petition, the court of appeal did not have before it any appeal from a denial of a petition, and there has been no delay.

Finally, it is anomalous for the State Attorney General to be attacking the local rules in question when he was part of the task force that led to their promulgation.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: April 2, 1992

Respectfully submitted,

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By _____
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JOHN G. BROWN